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In the Supreme Court of the United States

October Term 1974

NO. 74-1129

ROBERT ANTHONY JAMES,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

DANIEL S. PEARSON
PEARSON & JOSEFSBERG, P. A.
733 City National Bank Building
25 West Flagler Street
Miami, Florida 33130
Attorneys for Petitioner

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NO. _____

ROBERT ANTHONY JAMES,
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vs.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit Pursuant to 28 United States Code, Section 1254(1)

The Petitioner, ROBERT ANTHONY JAMES, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on January 2, 1975.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on January 2, 1975. A timely Petition for Rehearing and Rehearing En Banc was denied on February 6, 1975. Upon the motion of the Petitioner, the issuance of the mandate was stayed by the Court of Appeals to and including March 8, 1975. This Petition is timely. This Court's jurisdiction is invoked under Title 28 United States Code, Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW

I.

WHERE PETITIONER'S TRIAL COUNSEL PREVIOUSLY REPRESENTED TWO GOVERNMENT WITNESSES, ONE OF THEM CENTRAL TO THE PROSECUTION'S CASE, AND IT WAS EVIDENT TO THE TRIAL JUDGE THAT SUCH PRIOR REPRESENTATION CREATED A CONFLICT OF INTERESTS AND AT LEAST POTENTIAL PREJUDICE TO THE PETITIONER, IS IT NOT INCUMBENT UPON THE TRIAL JUDGE, IN ORDER TO GUARANTEE THE PETITIONER'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AMENDMENT, TO MAKE INQUIRY OF THE PETI-

TIONER TO DETERMINE THAT THE PETITIONER WAS AWARE OF THE CONFLICT AND KNOWINGLY WAIVED ANY OBJECTION TO IT?

II.

WHERE PETITIONER'S TRIAL COUNSEL PREVIOUSLY REPRESENTED TWO GOVERNMENT WITNESSES, ONE OF THEM CENTRAL TO THE PROSECUTION'S CASE, AND IT WAS EVIDENT AT TRIAL THAT SUCH PRIOR REPRESENTATION CREATED A CONFLICT OF INTERESTS AND AT LEAST POTENTIAL PREJUDICE TO THE PETITIONER, AND WHERE NO INQUIRY WAS MADE TO DETERMINE WHETHER THE PETITIONER WAS AWARE OF THE CONFLICT AND THE EXTENT TO WHICH THE CONFLICT COULD IMPAIR COUNSEL'S ABILITY TO EFFECTIVELY REPRESENT THE PETITIONER, CAN A PETITIONER'S KNOWING AND INTELLIGENT WAIVER OF HIS SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL BE PRESUMED FROM THE FACT THAT THE PETITIONER SILENTLY COMPLETED THE TRIAL WITH SUCH COUNSEL?

III.

WHERE THE PETITIONER WAS CONVICTED FOR VIOLATING THE MANN ACT,

18 U.S.C. §2422, BY CAUSING THE INTERSTATE TRANSPORTATION OF A WOMAN FROM ATLANTA TO NEW ORLEANS, AND WAS CONVICTED AND CONSECUTIVELY SENTENCED ON ANOTHER COUNT RELATING TO THE WOMAN'S RETURN FROM NEW ORLEANS TO ATLANTA, AND THERE IS NO EVIDENCE THAT THE PURPOSE OF HER RETURN WAS TO ENGAGE IN ANY ACTIVITIES PROHIBITED BY THE STATUTE, CAN THE CONVICTION OR CONSECUTIVE SENTENCE RELATING TO THE RETURN TRIP STAND IN LIGHT OF *MORTENSEN V. UNITED STATES*, 322 U.S. 369 (1944)?

IV.

WHERE THE PETITIONER RECEIVED CONSECUTIVE THREE-YEAR SENTENCES ON COUNTS I AND II OF AN INDICTMENT, AND CONCURRENT SENTENCES ON COUNTS III AND IV, CAN THE COURT OF APPEALS, FINDING THAT THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE CONVICTIONS ON COUNTS III AND IV, AFFIRM THE CONSECUTIVE SENTENCE IMPOSED ON COUNT II, AS TO WHICH THE EVIDENCE WAS INSUFFICIENT, ON THE THEORY THAT THE TRIAL COURT COULD HAVE USED COUNTS III OR IV AS THE BASIS FOR A CONSECUTIVE SENTENCE?

STATUTE INVOLVED

TITLE 18 UNITED STATES CODE, SECTION 2422

"Whoever knowingly persuades, induces, entices, or coerces any woman or girl to go from one place to another in interstate . . . commerce, . . . for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose on the part of such person that such woman or girl shall engage in the practice of prostitution or debauchery, or any other immoral practice, whether with or without her consent, and thereby knowingly causes such woman or girl to go and to be carried or transported as a passenger upon the line or route or any common carrier or carriers in interestate . . . commerce, . . . shall be fined not more than $5,000 or imprisoned not more than five years, or both."

STATEMENT OF THE CASE

On December 20, 1973, ROBERT ANTHONY JAMES was indicted by a grand jury in the Northern District of Georgia. He was charged in four counts with violations of the Mann Act. The first three of these counts, charging violations of 18 U.S.C. §2422, stated that on three separate dates in March, 1973, the Petitioner caused the interstate transportation for the purpose of prostitution of the same woman, Shirley Ann Newton. The fourth count, alleging a violation of 18 U.S.C. §2421, charged the Petitioner with transporting for purposes of prostitution one Sherry Dean Hill from one state to another.

In March, 1974, the case proceeded to trial by jury. The Petitioner, represented throughout by privately employed counsel, Mr. John Rogers of Atlanta, Georgia, was found guilty on all counts. Thereafter, on April 12, 1974, the court sentenced the Petitioner to consecutive confinement sentences of three years on Counts I and II and concurrent sentences of four years on each of Counts III and IV. The Petitioner thus was to be imprisoned for an overall term of six years.

From that judgment and commitment the Petitioner, by his present counsel, took an appeal to the United States Court of Appeals for the Fifth Circuit. In his appeal he raised, inter alia, the following points: (1) that the prior representation by James' trial counsel of two Government witnesses, one of them central to the prosecution's case, created a conflict of interests and prejudice to the Petitioner, such as to at least require the trial court to make inquiry of the Petitioner to insure that he was aware of the conflict and knowingly waived any objection, and (2) that the Petitioner's conviction and consecutive sentence on Count II for causing the interstate transportation of a woman from New Orleans to Atlanta could not stand where the record contained no evidence that the purpose of this trip was to engage in any activities prohibited by 18 U.S.C. §2422, and supported only that the trip was the return journey of a prior trip to New Orleans from Atlanta for which James was convicted on Count I.

A. The Facts Relating to Trial Counsel's Conflict of Interest.

The essence of the trial of James was distilled into the testimony of four women. It was from these four,

Shirley Ann Newton (the woman of Counts I through III of the Indictment), Sherry Dean Hill (the woman of Count IV of the Indictment), Rudine Burnett and Brenda Hill, that the Government elicited and attempted to elicit testimony about James' inducements to them and coercion of them for the immoral purpose of prostitution. Both Shirley Ann Newton and Brenda Hill had previously been represented by James' trial counsel.

Mr. Rogers, counsel for James, had hardly begun his cross-examination of the Government's first witness, Shirley Ann Newton, when the following colloquy occurred:

"Q [Rogers] Where did you live prior to November [1973]?
"A Well, Mr. Rogers, I think you defended me before I went off to the penitentiary.

"Q That's true. But I asked you where you lived."

It was clear then to all within earshot, including the prosecutor and the Court, that Newton had been a client of Rogers and clear that that representation was as recent as June, 1973. No inquiry was made by the Court.

If the potentials of this conflict were not then apparent, they soon became so. Rogers' examination turned to the character of the witness as a prostitute; the witness's harpooning responses turned to the character of Rogers as a defense attorney:

"Q All right, did you consider becoming a prostitute violating the laws of the State of Georgia?
"A I didn't consider it.

"Q Unless you got caught, it wasn't a violation?
"A Perhaps that's the way you defended me in court, that's the way you presented it then.

"Q All right."

Still silence by the Court.

Within moments, Rogers' attempted examination of the witness became bizarre: Newton became the interrogator, Mr. Rogers the witness:

"Q I show you Defendant's Exhibit 2, certified copy of accusation from the Criminal Court of Fulton County, and ask if you are the person named in that indictment.
"A Yes, I am.

"Q And were you convicted in this indictment?
"A No, sir, Mr. Rogers. You defended me, don't you remember?

"Q Yes, I remember it.
"A Well, then quite surely you can recall I got twelve months suspended sentence."

And again:

"Q [By Mr. Rogers] Well, are you the Shirley Ann Newton that paid the $27.00?

"A I am Shirley Ann Newton, but I don't know about this $27.00, Mr. Rogers, I don't recall.

"Q In 1972?
"A I still don't recall it.

"Q Did you go to City Court in 1971?
"A I don't recall it, Mr. Rogers. When you ever carried me to court have I ever come out with a $27.00 fine?

"Q Yes."

All efforts at examination and impeachment of the witness had broken down. The Court responded:

"THE COURT: You don't ask the lawyers questions and the lawyer is not supposed to answer them. The lawyer can confine his statements to the form of questions to you, and you should answer them.

"I caution counsel he shouldn't answer questions advanced by the witness."

But the situation worsened—the attorney soon found himself respondent in a dialogue in which he was being accused by the witness of knowing that James paid for her representation by him, and knowing that she lied to the police when she denied being a prostitute for the Petitioner:

"Q Did you pay me for carrying you to court?
"A I gave you the money that Bobby gave me.

"Q How about the times prior to the time that you knew Bobby?
"A What are you saying? I just told you I gave you the money he gave me.

"Q What about money you gave me for going to court prior to the time you knew Bobby, when you worked for Johnny Bond?
"A You never been to court with me when I went with Johnny Bond.

"Q I have never been to court for you when you worked for Bobby, have I?
"A Sure you have, Mr. Rogers.

"Q When was that?
"A June, remember in June when Carson was representing me, I caught the case at the Sheraton-Biltmore Hotel on West Peachtree, I was with Bobby when I had that case. I think I lied to Mr. Carson about not being with him at the time he locked me up that night.

"Q You lied to Mr. Carson. Who are you referring to, Detective Carson?
"A That's right.

"Q You lied to him about not being with who?
"A Bobby. When he asked me—he said a whole lot of pimps live out on North Camp Creek Parkway. He started to name them. He called Bobby's name.

"I said, 'I have not been with him,' but I knew I was, *and you knew I was.*" (Emphasis supplied).

* * *

"Q You say now you were working for him at that time. Which is the truth?

"A I were working for him, Mr. Rogers. But you know, you represented a lot of prostitutes in your time, and I understand you have. You know no girl is going to come out and tell no policeman right off she's with a guy, I know you understand that.

"Q All right."

Still the Court did not act to intervene. The attempted interrogation of this witness and thus the defense of James was hopelessly mired by counsel's prior relationship with her. Rogers, apparently impelled now to testify to extricate himself from the witness's accusation that he was paid by James to represent James' girls, returned again to this examination. He was soon met by a new accusation—that he did not give clients receipts for cash fees.

"Q You paid me for defending you?

"A Right.

"Q Nobody else paid me; you paid me yourself?

"A Bobby gave me the money to carry to you, right?

"Q I don't know. That's what I'm asking you. "Who paid me for defending you?

"A Bobby did. I carried it to you. Your secretary, she wrote it down.

"Q Was Bobby there when you brought money in?
"A No, he weren't, but I think he called you up, called your secretary up.

"Q Was it paid in cash?
"A Yes, it were.

"Q Were you given a receipt for it?
"A No, I wasn't. I don't think—

"Q So, as far as you know, Bobby has never paid me any money for you or anybody else until he's paid for himself, is that right?
"A You don't have a point of giving receipts.

"Q I do sometimes, and sometimes I don't if you want me to answer the question."[1]

Towards the end of counsel's examination, his ability to represent James, by virtue of his relationship to the witness, deteriorated to the point where an argument ensued between the witness and counsel as to whether she had called him "John" since she was "just that familiar with [him]." Rogers then challenged the record as to her having called him "John." The Court's ironic response was:

"Well, the jury will remember the *evidence* if she is in error." (Emphasis added).

[1]Here the Court merely noted, "Well, I think I am going to have to stop this practice."

Indeed, counsel's relationship with the witness had so severely inhibited his ability to confront the witness that the "evidence" had sadly been reduced to whether or not the witness called him "John."

We turn now to counsel's prior relationship with Brenda Hill, another Government witness. Rogers admitted in the presence of the jury to having "represented her ever since she was a young teenager." While it is true that she denied ever working for the Petitioner as a prostitute, the truth of that denial was challenged by the prosecutor. The very fact of counsel's prior and long-standing representation of this witness enhanced the suggestion (imparted in the minds of the jurors during the Newton colloquy) that the Petitioner had paid counsel to represent these girls and easily led to the inference that Brenda Hill, out of allegiance to the Petitioner, would lie on his behalf.

B. **The Facts Relating to Count II.**

In Count II of the Indictment James was charged with causing the interstate transportation of Shirley Ann Newton from New Orleans to Atlanta on March 10, 1973. Newton testified that she and Rudine Burnett were asked by James on March 5, 1973, to go from Atlanta to New Orleans for the purpose of prostitution. That trip from Atlanta to New Orleans on that very date of March 5, 1973, became the crime with which James was charged in Count I. The only testimony[2] bearing upon the return

[2]While Rudine Burnett did testify that she accompanied Shirley Newton to and from New Orleans, she denied any knowledge of illicit activities in either place.

from New Orleans was that Newton stayed there until March 10 and was told by James when to come back to Atlanta. She testified that upon her return, she and Rudine went to their respective homes, and since she had not made sufficient money in New Orleans, she and Rudine unsuccessfully attempted to make some money in Atlanta before going to see James. Thereafter, Newton stated she gave the Petitioner $300.00, her proceeds from New Orleans and testified that James beat her. James then departed by car without her for California. Nine days later Newton flew to California. She testified to no prostitution activities whatsoever in Atlanta from the time of her return from New Orleans to the time of her departure to California; nor was there any testimony elicited that the purpose of her return to Atlanta was for prostitution.

On January 2, 1975, the Court of Appeals, having placed James' appeal on its summary calendar for disposition without oral argument, affirmed the convictions. In its opinion, which concedes, as it must, that the "fact of Rogers' prior representation of Shirley Ann Newton[3] on unrelated state charges was brought to the trial court's attention . . ." (Opinion, p. 2074), the Court of Appeals nevertheless holds that "Appellant [James] cannot now, after knowingly completing the trial with such counsel, urge that he was prejudiced." Implicit in this holding is that a trial judge who becomes aware of an apparent conflict of interest which might impair the effective assistance of counsel has no duty to conduct an inquiry to

[3]Trial counsel's prior representation of Brenda Hill was equally obvious to the trial court although not specifically noted by the appellate court.

see to it that the defendant is fully advised of the facts underlying the potential conflict and knowingly and intelligently waives any objection he might have.

In affirming the conviction on Count II, despite a total lack of evidence that the purpose of Shirley Ann Newton's return trip to Atlanta was to engage in any activity prohibited by 18 U.S.C. §2422,[4] the Court of Appeals reasoned that the conviction should stand, since there was no miscarriage of justice in that the evidence of guilt was overwhelming[5], and the trial court could have used either Count III or IV to impose a consecutive sentence (Opinion, p. 2076).

On February 6, 1975, James' Petition for Rehearing and Rehearing En Banc, again raising these points, was denied. His Motion for Stay of Issuance of Mandate pending this Petition, and raising these same issues, was granted.

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[4]The Court of Appeals Opinion states (p. 2073) ". . . she engaged in further acts of prostitution in Atlanta in an attempt to make the $1,000." The trial record contains no support for this statement. On his Petition for Rehearing, which was denied, James pointed this out again.

[5]The appellate court's statement that the evidence of guilt was overwhelming, if referring to the evidence on Count II, is factually incorrect. If the statement referred to evidence on other counts, it was irrelevant to James' point.

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW RELATING TO A TRIAL COURT'S OBLIGATION TO INSURE THE EFFECTIVE ASSISTANCE OF COUNSEL WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The story of the trial of the Petitioner shows that his trial counsel had in the recent past and on many occasions represented two Government witnesses; that counsel's cross-examination of Shirley Ann Newton, one of his former clients and a central prosecution witness, was rendered conspicuously inadequate due to counsel's prior representation of her; that the trial judge, aware of defense counsel's position of conflict, sat idly by; and that all of this may have resulted in a denial of the Petitioner's rights under the Sixth Amendment to the United States Constitution to the effective assistance of counsel.

In the face of this, the Court of Appeals announces a rule which permits the trial court to be no more than an idle spectator when, indeed, it is only the trial court that can intervene to insure that a defendant's rights in such circumstances are protected. The appellate court's holding, that one who completes a trial with such counsel cannot thereafter urge that he was prejudiced, creates a presumption that a defendant, simply by permitting such conflicting representation to continue, has made a knowing and intelligent waiver of his right to the effective assistance of counsel.

In circumstances where counsel for a defendant is placed in the equivocal position of having to cross-examine his own former client as an adverse witness, his zealous defense of the defendant is counterpoised against solicitude for the witness. The risk of such ambivalence is something that no attorney should accept,[6] and, more important, no court should countenance. The prejudice which might arise from such a conflict of interests may be subtle, even unconscious. It may escape detection on review. The trial record may often give no clue to the erosion of effective assistance of counsel which may ensue from such conflicts. The right to have the effective assistance of counsel "is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." *Glasser v. United States* (1942) 315 U.S. 60, 76.

A rule, then, such as that fashioned by the appellate court in the instant case, which presumes from a defendant's silence during trial his waiver of this fundamental Sixth Amendment right,[7] and relieves the trial

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[6]"Maintaining the independence of professional judgment required of a lawyer precludes his acceptance or continuation of employment that will adversely affect his judgment on behalf of or dilute his loyalty to a client. *This problem arises* whenever a lawyer is asked to represent two or more clients who may have differing interest, *whether such interests be conflicting, inconsistent, diverse, or otherwise discordant.*" (Emphasis added). ABA Code of Professional Responsibility, Ethical Consideration (EC) 5-14.

[7]Even if Defendant retained counsel with knowledge of counsel's prior representation of these prosecution witnesses, this would not end the need for an inquiry by the trial court, nor preclude relief in the absence of proof that there was chicanery on the part of the Defendant's attorney or some scheme to thwart justice. *District of Columbia v. Scott* (D.C. Cir. 1954) 94 U.S. App. D.C. 227, 214 F.2d 860.

court of any obligation to insure that such waiver is knowingly and intelligently made, is one which requires review by this court.

This Court has repeatedly made clear that it is the trial court's duty and responsibility to determine whether there is an intelligent and competent waiver by the accused to have the assistance of counsel. "While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record." *Johnson v. Zerbst* (1938) 304 U.S. 458, 465; *Glasser v. United States* (1942) 315 U.S. 60, 71. Presuming waiver of counsel from a silent record is impermissible. *Carnley v. Cochran* (1962) 369 U.S. 506, 516; *Craig v. Beto* (5th Cir. 1972) 458 F.2d 1131, 1135. The decision of the Court of Appeals, sought here to be reviewed, which imposes no duty upon the trial court and presumes waiver by the Petitioner's silence, is incompatible with the teachings of the above cited cases. The distinction between ineffective assistance of counsel created by a conflict of interests and no assistance of counsel whatsoever cannot justify the rule laid down by the Court of Appeals.

II.

THE COURT OF APPEALS HAS DECIDED A FEDERAL QUESTION IN A WAY IN CONFLICT WITH THIS COURT'S DECISION IN MORTENSEN V. UNITED STATES (1944) 322 U.S. 369.

James was charged in Count II with persuading, inducing, enticing and coercing Shirley Ann Newton to go from New Orleans, Louisiana, to Atlanta, Georgia, with the intent and purpose on his part that she should engage in the practice of prostitution. This interstate trip of Newton's, as to which there was ample proof, occurred on March 10, 1973, five days after Newton had left Atlanta to go to New Orleans. That earlier trip was the subject of Count I; the return to Atlanta was the subject of Count II. James was convicted on both of these counts and consecutive three-year sentences were imposed.

The separation of the Atlanta-New Orleans round trip into two separate units of prosecution was unsupported by the evidence. Assuming sufficient evidence existed to establish that the purpose of Newton's trip from Atlanta to New Orleans was one condemned by the statute, there was no evidence supporting that Newton's return had its own unlawful purpose. In *Mortensen v. United States* (1944) 322 U.S. 369, this Court made clear that an offense under the Mann Act could not be predicated upon a return interstate journey and a later resumption of illicit activities in the state from which the defendants had departed for an innocent vacation. The oft quoted reasoning of the Court was (322 U.S. at 375):

> "The fact that the two girls actually resumed their immoral practices after their return to Grand Island does not, standing alone, operate to inject a retroactive illegal purpose into the return trip to Grand Island. Nor does it justify an arbitrary splitting of the round trip into two parts so as to permit an inference that the purpose of the drive to Salt Lake City was innocent while the purpose of the homeward journey to Grand Island was criminal. The return journey under the circumstances of this case cannot be considered apart from its integral relation with the innocent round trip as a whole."

While Petitioner does not contend that the purpose of the Atlanta to New Orleans first leg of the journey shared the innocent purpose of *Mortensen*, the principle of non-bifurcation of offenses announced in *Mortensen* is, we submit, equally applicable where the purpose of the exodus is non-innocent. Cf. *Nelms v. United States* (4th Cir. 1961) 291 F.2d 390. In the instant case the conclusion must be that Newton's return from New Orleans to Atlanta, her home, anticipated in the first instance and viewed at its worst to have been for the purpose of bringing back to the Petitioner the proceeds of her gains in New Orleans, was merely a part of a single excursion. The Petitioner could not be subjected to conviction for both offenses. For the same reasons, the "rule of lenity," see *Bell v. United States* (1955) 349 U.S. 81, requires at least that the Defendant not be consecutively *punished* for both offenses.

III.

THE COURT OF APPEALS' AFFIRMANCE OF A CONSECUTIVE SENTENCE ON COUNT II ON THE BASIS THAT THE TRIAL COURT COULD HAVE IMPOSED SUCH A CONSECUTIVE SENTENCE ON OTHER COUNTS UPON WHICH THE PETITIONER WAS CONVICTED SO FAR DEPARTS FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

The Petitioner received consecutive three-year sentences on Counts I and II. The Court of Appeals affirmed the Count II conviction, supported by no evidence, on two apparent theories: (1) there was no miscarriage of justice, in that the evidence of guilt was overwhelming, and (2) the district court could have used either Count III or Count IV to impose a consecutive sentence.

As to theory number one, if the court's statement that the "evidence of guilt was overwhelming" referred to the evidence as to Count II, it was factually incorrect. If that statement referred to evidence on other counts, it was irrelevant to an attack on Count II.

The second theory, that a consecutive sentence should stand, even if the underlying conviction is unsupported by evidence, where concurrent counts are supported by sufficient evidence, constitutes, in essence, a modification of the district court's sentence by an appellate court and departs from the accepted course of judicial proceedings.

From the reasoning of the appellate court it would follow that no manifest miscarriage of justice occurs where a defendant is sentenced to five-year sentences to run consecutively on two counts, one of which had no evidence to support the conviction, if the trial court could have imposed as much as ten years on one of the counts. From the reasoning of the appellate court it would follow that where a defendant is sentenced to a period of incarceration on one count and probation on another, and the court concludes that although only the count involving probation is supported by sufficient evidence, since the trial court could have imposed sentence otherwise, no manifest miscarriage of justice occurred. The ruling of the Court of Appeals opens the way to such sentence enhancement.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

PEARSON & JOSEFSBERG, P.A.
Attorneys for Petitioner
733 City National Bank Building
25 West Flagler Street
Miami, Florida 33130

By _____
Daniel S. Pearson

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing Petition for A Writ of Certiorari in this cause were served by United States Mail upon the HONORABLE ROBERT H. BORK, Solicitor General of the United States, Department of Justice, Washington, D. C. 20530, this ____ day of March, 1975.

PEARSON & JOSEFSBERG, P.A.
Attorneys for Petitioner

By _____
Daniel S. Pearson

APPENDIX

APPENDIX

United States Court of Appeals,
Fifth Circuit.

Jan. 2, 1975.

No. 74-2435
Summary Calendar.*

UNITED STATES of America, Plaintiff-Appellee,
v.

Robert Anthony JAMES, Defendant-Appellant.

Defendant was convicted in the United States District Court for the Northern District of Georgia, at Atlanta, Albert J. Henderson, Jr., J., for violations of the Mann Act, and he appealed. The Court of Appeals, Ainsworth, Circuit Judge, held that defendant did not show ineffective assistance of counsel based on alleged conflict of interest; that allegedly improper argument of prosecutor was, at most harmless; that there was no plain error in failure to instruct sua sponte on limited use of impeachment evidence; and that there was no manifest miscarriage of justice in convicting and sentencing defendant in connection with both halves of round trip made by prostitute.

Affirmed.

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*Rule 18, 5 Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York et al., 5 Cir., 1970, 431 F.2d 409, Part I.

1. Criminal Law —641.5

Defendant in Mann Act prosecution was not denied effective assistance of counsel by reason of fact that his counsel, often at the direction of defendant, had previously represented woman whom defendant allegedly had caused to travel in interstate commerce for the purpose of prostitution and who was a government witness, where defendant had complete knowledge of the previous relationship and showed no specific prejudice. 18 U.S.C.A. §§ 2421, 2422.

2. Criminal Law —1171.3

Even if closing argument of prosecutor suggesting change of testimony of certain witnesses was improper on ground that there was no evidence thereof, it constituted no more than harmless error where the prejudicial effect, if any, thereof was slight in the context of the entire trial and where the evidence of guilt was overwhelming.

3. Criminal Law —1038.2

Where impeachment in question related to testimony of witnesses whose testimony, at best, would have been cumulative in that a damning case had already been presented by the Government, failure of court to sua sponte instruct on limited use of impeachment evidence produced by the prosecution was not plain error. Fed.Rules Crim. Proc. rule 52(b), 18 U.S.C.A.

4. Criminal Law —1044.1(7)

Where there was no motion for judgment of acquittal at the close of the Government's case, the Court of Appeals would not review the sufficiency of the evidence save to determine whether a manifest miscarriage of justice had occurred.

5. Criminal Law —1210

Where evidence of guilt on several counts in prosecution under the Mann Act was overwhelming and other counts could have been used as a basis for consecutive sentence, there was no manifest miscarriage of justice in convicting defendant and imposing consecutive sentence under count based on prostitute's trip back from city to which defendant had sent her as well as under count based on her original trip to that city. 18 U.S.C.A. § 2421 et seq.

Appeal from the United States District Court for the Northern District of Georgia.

Before BROWN, Chief Judge, and THORNBERRY and AINSWORTH, Circuit Judges.

AINSWORTH, Circuit Judge:

Appellant, Robert Anthony James, was convicted on a four-count indictment for violations of the Mann Act, 18 U.S.C. §§ 2421, 2422, which proscribes knowingly inducing, enticing, and coercing women to travel in interstate commerce for the purpose of engaging in prostitution. In this appeal appellant alleges his counsel was ineffective because of a conflict of interest allegedly resulting

from counsel's prior representation of a Government witness; that the court erred in not giving certain instructions; and that there was insufficient evidence to sustain the conviction on Count II of the indictment. A review of these alleged errors reveals no basis for reversal, and we therefore affirm.

Testimony at trial revealed that appellant was a pimp. In 1973, he sent Shirley Ann Newton from Atlanta to New Orleans during Mardi Gras to engage in prostitution with orders to earn $1,000. When she, at appellant's direction, returned to Atlanta with only $600, appellant beat Shirley Ann Newton, and she engaged in further acts of prostitution in Atlanta in an attempt to make the $1,000. Subsequently, Shirley Ann Newton was forced to go from Atlanta to San Francisco to engage in prostitution for James. Appellant was also charged with coercing Sherry Dean Hill to go from Atlanta to Las Vegas for purposes of prostitution. In his brief, appellant admits the sufficiency of the evidence for all the interstate trips except that one from New Orleans back to Atlanta, Count II of the indictment.

[1] Appellant's trial counsel, John Rogers, had previously defended Shirley Ann Newton on various prostitution charges in state courts. It appears that Rogers' representation of Shirley Ann Newton was often at the direction of appellant. Appellant now alleges this led to a conflict of interest between counsel's obligation to appellant and his obligations to a former client, a conflict of interest which is claimed to have impaired cross-examination. Appellant also alleges the court should have held a hearing on this matter. The fact of Rogers' prior representation of Shirley Ann Newton on unrelated state

charges was brought to the court's attention, and of course was well known to appellant himself. No specific showing of prejudice has been made. Indeed, appellant likely thought he had an advantage in having counsel with complete knowledge of Shirley Ann Newton's previous history. In situations such as this where the client was aware of the previous relationship, we have denied such claims in the absence of a clear showing of prejudice. Harrison v. United States, 5 Cir., 1968, 387 F.2d 614, 615. We previously noted in a similar situation that "[a]ppellant cannot now, after knowingly completing the trial with such counsel, urge that he was prejudiced." Nelson v. United States, 5 Cir., 1969, 415 F.2d 483, 487-488, cert. denied, 396 U.S. 1060, 90 S.Ct. 751, 24 L.Ed.2d 754 (1970).

[2] Appellant next alleges he was entitled to a mistrial or an instruction regarding statements made by the prosecutor in closing argument. The statements were initially objected to, but there was no request for a mistrial or an instruction. The objected to statement is as follows:

> MR. TURNER: You have heard from Shirley Ann Newton that she was a victim of two things in dealing with this defendant: One is his charm, because it was this defendant's charm which initially caused her to enter into prostitution for him. I think that charm can be observed by all of you here, and that you saw other women sitting on the stand, women who, having dealt with this defendant, haven't seen him for over a year, women who refused to testify, women who changed their testimony before the grand jury, just sitting here in the presence of this man.

MR. ROGERS: Now, Your Honor, at this time I hate to object, but—

THE COURT: What was the statement?

MR. ROGERS: He's getting awful close to a motion in that he says they have changed their testimony. There is no evidence in this case of any change of testimony, Your Honor.

THE COURT: I don't believe there is any evidence of that.

MR. TURNER: I'm sorry, Your Honor.

Viewing the record as a whole, including those portions of the prosecutor's argument to which objection is made, in the context of a hotly contested trial, we are convinced no reversible error was committed. The prejudicial effect, if any, of the alleged improper argument appears to be slight while the evidence of guilt is overwhelming. Even if the argument was improper, it constituted no more than harmless error. United States v. Rhoden, 5 Cir., 1972, 453 F.2d 598, 600.

[3] Appellant claims next that he was entitled to an instruction on the limited use of impeachment evidence used by the prosecutor. No such instruction was properly requested by trial counsel, and thus a plain error holding would be essential to a decision to reverse. Fed.R.Crim. P.52(b). While we have noted the desirability of instructing juries as to the limited purposes for which impeachment evidence is admitted, e. g., Slade v. United States, 5 Cir., 1959, 267 F.2d 834, we have not held that the

failure to give an instruction sua sponte automatically results in reversible error. See Valentine v. United States, 5 Cir., 1959, 272 F.2d 777, 778. We decline to do so now. Rather, we note that the impeachment complained of related to the testimony of witnesses whose testimony, at best, would have been cumulative. A damning case had already been presented by the Government. Under the facts and circumstances of this case, the lack of an instruction was not so critical as to affect the substantial rights of the appellant. See United States v. Helms, 5 Cir., 1972, 467 F.2d 1085.

[4, 5] Finally, appellant argues there was insufficient evidence on Count II of the indictment, concerning the trip from New Orleans back to Atlanta. Appellant argues that Shirley Ann Newton's trip from Atlanta to New Orleans and back to Atlanta constitutes only one, and not two, violations of the Mann Act. Since there was no motion for a judgment of acquittal at the close of the Government's case, we will not review the sufficiency of the evidence save to determine whether a manifest miscarriage of justice has occurred. United States v. Fruge, 5 Cir., 1974, 495 F.2d 557, 558, and cases there cited. No such miscarriage of justice resulted here, in that the evidence of guilt was overwhelming. Moreover, the district court could have given James a consecutive sentence based on either Count III or Count IV, rather than using Count II as the basis for a consecutive sentence.

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1974

No. 74-2435
Summary Calendar

D. C. Docket No. CR-28509

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

ROBERT ANTHONY JAMES,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Georgia

Before BROWN, Chief Judge, and THORNBERRY and AINSWORTH, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

January 2, 1975

Issued as Mandate:

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

OFFICE OF THE CLERK

February 6, 1975

TO ALL COUNSEL OF RECORD

No. 74-2435 — USA v. Robert Anthony James

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH
CLERK

By /s/ Anne G. Parent
Deputy Clerk

cc: Mr. Daniel S. Pearson
Mr. John Milton Turner, Jr.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 74-2435

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

ROBERT ANTHONY JAMES,
Defendant-Appellant.

ON CONSIDERATION OF THE APPLICATION of the appellant in the above numbered and entitled cause for a stay of the mandate of this Court therein, to enable appellant to apply for and to obtain a writ of certiorari from the Supreme Court of the United States. IT IS ORDERED that the issuance of the mandate of this Court in said cause be, and the same is stayed to and including March 8, 1975, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that certiorari petition has been filed. IT IS FURTHER ORDERED that the Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

Robert A. Ainsworth, Jr.
UNITED STATES CIRCUIT JUDGE